Shuvo Molla v Ketua Pengarah Imigresen Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–172–07 OF 2019
COLLIN SEQUERAH J
2 SEPTEMBER 2019

Immigration — Cancellation of temporary employment visit pass — Order of detention and order of removal — Whether applicant could be subjected to order of removal — Whether detention of applicant lawful — Whether applicant denied his right of appeal — Whether there was procedural non-compliance with Immigration Act 1959/63 or Immigration Regulations 1963 — Immigration Act 1959/63 ss 32(1), 34(1), 35, 52(2) & 56(2) — Immigration Regulations 1963 regs 19 & 39(b)

This was an application by the applicant for, inter alia: (a) a declaration that the order of detention and removal issued to the applicant by the first respondent was a non-compliance and irregularity of the removal procedure under s 33(1) of the Immigration Act 1959/63 ('the Act') and the procedures of detention under s 34(1) of the Act; and (b) an order of writ of habeas corpus issued to allow the applicant to be released from the custody and control of the second respondent. The applicant was arrested on suspicion of committing an offence under the Act and reg 39(b) of the Immigration Regulations 1963 ('the Regulations'). Investigations revealed that the applicant had failed to comply with the requirements/conditions imposed on the temporary employment visit pass issued to him as he was caught working at Matshu Seiki (M) Sdn Bhd, a different employer/company altogether from the registered employer as endorsed on his pass ie Sykt Lestary Golden Sdn Bhd. The applicant pleaded guilty for the charge under under reg 39(b) of the Regulations and paid RM500 of fine. Subsequently, upon payment of the fine, the applicant was arrested under s 35 of the Act. By virtue of reg 19 of the Regulations, the applicant's temporary employment visit pass was cancelled and a notice of cancellation of the pass under the Regulations was issued. An order of detention under s 34 of the Act and an order of removal under s 56(2) of the Act were issued to the applicant in order to effect his removal from the country. The applicant was then detained at the KLIA Immigration Detention Centre pending the process of arrangements made for his removal from Malaysia. Hence, this application.

Held, dismissing the application:

(1) Section 32(1) of the Act did in no way represent or state that it was only persons convicted of offences under ss 5, 6, 8 or 9 that shall be liable to be

removed from Malaysia. Any person belonging to the categories of persons in s 52(2) of the Act were also liable to be removed from Malaysia. The applicant had failed to comply with the conditions issued in his temporary working visit pass with the rightful registered employer and thus contravened reg 39(b) of the Regulations (see paras 42 & 44–46).

(2) Once the applicant's pass was cancelled, it followed, as night the day, that he was unlawfully remaining in Malaysia. He was therefore, liable to be removed from Malaysia by order of the Director General pursuant to the clear wording of s 56(2) of the Act. There was no cogent reason in principle to distinguish between the imposition of a fine and imprisonment for the purposes of categorising who or who was not a prohibited class of immigrants. The powers of arrest and detention of the applicant under the provisions of ss 34 and 35 respectively of the Act once the applicant was liable to be removed pursuant to s 56(2) of the Act was also lawful (see paras 49 & 51–52).

(3) As the applicant was found guilty and convicted for contravening or failing to comply with a condition imposed in respect of his pass, this led to the act of cancelling the applicant's employment pass under reg 19 of the Regulations. A perusal of reg 19 would indicate that it did not provide the holder of the pass the right to appeal. It followed that the applicant had no avenue of appeal more so when he pleaded guilty to the offence (see paras 55–56 & 58).

(4) There was nothing to indicate that the applicant had suffered any prejudice as a result. There was evidence to show that the applicant was indeed served with the notice of cancellation of pass. Therefore, there was no merit to the applicant's contention that the respondents had no right and lawful authority to first detain the applicant prior to any order of deportation being issued to the applicant. In the circumstances, there was no procedural non-compliance with the Act or the Regulations nor was the order of detention and the order of removal issued mala fide or irregularly (see paras 60–62).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon untuk, antara lain: (a) perisytiharan bahawa perintah penahanan dan penyingkiran yang dikeluarkan kepada pemohon oleh responden pertama adalah ketidakpatuhan dan penyelewengan prosedur penyingkiran di bawah s 33(1) Akta Imigresen 1959/63 ('Akta') dan prosedur penahanan di bawah s 34(1) Akta; dan (b) perintah perintah habeas corpus yang dikeluarkan untuk membolehkan pemohon dibebaskan dari jagaan dan kawalan responden kedua. Pemohon ditangkap kerana disyaki melakukan kesalahan di bawah Akta dan peraturan 39(b) Peraturan Imigresen 1963 ('Peraturan'). Siasatan menunjukkan bahawa pemohon gagal mematuhi

keperluan/syarat yang dikenakan pada pas lawatan kerja sementara yang dikeluarkan kepadanya kerana dia ditangkap bekerja di Matshu Seiki (M) Sdn Bhd, majikan/syarikat yang berbeza sama sekali dengan majikan berdaftar sebagaimana yang disahkan atas pasnya iaitu Sykt Lestary Golden Sdn Bhd. Pemohon mengaku bersalah atas pertuduhan di bawah peraturan 39(b) Peraturan dan membayar denda RM500. Selepas itu, setelah membayar denda, pemohon ditangkap di bawah s 35 Akta. Berdasarkan peraturan 19 Peraturan, pas lawatan kerja sementara pemohon dibatalkan dan notis pembatalan pas berdasarkan Peraturan dikeluarkan. Perintah penahanan di bawah s 34 Akta dan perintah penyingkiran di bawah s 56(2) Akta telah dikeluarkan kepada pemohon untuk melaksanakan penyingkirannya dari negara ini. Pemohon kemudian ditahan di Pusat Tahanan Imigresen KLIA sementara menunggu proses pengaturan yang dibuat untuk penyingkirannya dari Malaysia. Oleh itu, permohonan ini.

Diputuskan, menolak permohonan:

(1) Seksyen 32(1) Akta sama sekali tidak menyampaikan atau menyatakan bahawa hanya orang yang disabitkan dengan kesalahan di bawah ss 5, 6, 8 atau 9 yang akan boleh dikeluarkan dari Malaysia. Mana-mana orang yang tergolong dalam kategori orang dalam s 52(2) Akta juga boleh dikeluarkan dari Malaysia. Pemohon gagal mematuhi syarat-syarat yang dikeluarkan dalam pas lawatan kerja sementara dengan majikan yang sah dan dengan itu melanggar peraturan 39(b) Peraturan (lihat perenggan 42 & 44–46).

(2) Setelah pas pemohon dibatalkan, ia diikuti dengan dia tinggal di Malaysia secara tidak sah. Oleh itu, dia boleh disingkirkan dari Malaysia dengan perintah Ketua Pengarah berdasarkan pernyataan yang jelas dalam s 56(2) Akta. Pada dasarnya tidak ada alasan yang meyakinkan untuk membezakan antara pengenaan denda dan penjara dengan tujuan untuk mengkategorikan siapa atau siapa bukan golongan pendatang haram. Kuasa penangkapan dan penahanan pemohon berdasarkan peruntukan ss 34 dan 35 masing-masing Akta apabila pemohon boleh disingkirkan berdasarkan s 56(2) Akta juga sah (lihat perenggan 49 & 51–52).

(3) Oleh kerana pemohon didapati bersalah dan disabitkan kerana melanggar atau tidak mematuhi syarat yang dikenakan berkenaan dengan pasnya, ini menyebabkan tindakan membatalkan pas pekerjaan pemohon di bawah peraturan 19 Peraturan. Penelitian peraturan 19 akan menunjukkan bahawa ia tidak memberikan pemegang pas hak untuk membuat rayuan. Ini menunjukkan bahawa pemohon tidak mempunyai jalan untuk rayuan lebih-lebih lagi ketika dia mengaku bersalah atas kesalahan itu (lihat perenggan 55–56 & 58).

(4) Tidak ada yang menunjukkan bahawa pemohon mengalami prejudis

sebagai akibatnya. Terdapat keterangan yang menunjukkan bahawa pemohon memang diserahkan dengan notis pembatalan pas. Oleh itu, tidak ada merit mengenai pendapat pemohon bahawa responden tidak mempunyai hak dan kuasa untuk menahan pemohon terlebih dahulu sebelum perintah penyingkiran dikeluarkan kepada pemohon. Dalam keadaan tersebut, tidak ada prosedur yang tidak dipatuhi Akta atau Peraturan atau perintah penahanan dan perintah penyingkiran dikeluarkan mala fide atau tidak teratur (lihat perenggan 60–62).]

Cases referred to

Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor [2017] MLJU 902, CA (refd)

Legislation referred to

Immigration Act 1959/63 ss 3(2), (3), 5, 5(2), 6, 6(3), 8, 8(5), (6)(a), 9, 9(3), (5), (7), (8), 14(5)(b), 32(1), 33(1), (2)(c), 34, 34(1), 35, 51(3)(a), (5)(b), 52(2), 56(2), 59A(1), (2)
Immigration Regulations 1963 regs 19, 19(1A), 26, 26(1), 39(b)

Harpal Singh a/l Tara Singh (T Harpal & Assoc) for the applicant.
Ainaa Lutfiah bt Mohamed Zulkafli (Public Prosecutor, Attorney Generals' Chambers) for the respondents.

Collin Sequerah J:

INTRODUCTION

[1] The applicant filed a notice of motion dated 8 July 2019 to obtain the following orders:

(a) a declaration that the order of detention and removal issued to the applicant by the first respondent is a non-compliance and irregularity of the removal procedure under s 33(1) of the Immigration Act 1959/63 (Act 155) and the procedures of detention under s 34(1) (Act 155);

(b) an order of writ of habeas corpus issued to allow the applicant to be released from the custody and control of the second respondent; and

(c) any other orders/instructions as the honourable court may deem fit.

BACKGROUND FACTS

[2] The pertinent facts leading to the filing of this application by the applicant reveal that on 21 November 2018 at around 12.05pm, a team lead by Deputy Assistant Director (TPPI) Rasul bin Jasin from the Operations, Investigation and Prosecution Division of the Immigration Department of Malaysia, conducted a raid at Matshu Seiki (M) Sdn Bhd, No 8, 77 & 79, Jalan

TPP 1/3, Taman Industri Puchong, Batu 12, 47100 Puchong, Selangor Darul Ehsan ('location'). A

[3] As a result of the said raid, a 26-year-old non-citizen from Bangladesh named Shuvo Molla ('applicant') was arrested on suspicion of committing an offence under the Immigration Act 1959/63 (Act 155) ('the Act') and reg 39(b) of the Immigration Regulations 1963 ('the Regulations'). B

[4] Investigations conducted thereto revealed that the applicant had failed to comply with the requirements/conditions imposed on the temporary employment visit pass ('pas lawatan kerja sementara') issued to him as he was caught working not with his registered Employer as endorsed on his pass but at the arrested location is (Matshu Seiki (M) Sdn Bhd), who is a different employer/company all together from the initial company he ought to be employed with ie Sykt Lestary Golden Sdn Bhd. C D

[5] A notice of detention under s 51(5)(b) of the Act, by virtue of the power to arrest accorded to an immigration officer under s 51(3)(a) of the Act, was issued to the applicant by TPPI Rasul bin Jasin. The said notice was for a period of 14 days from 21 November–4 December 2018 for purposes of further investigations. E

[6] On 30 November 2018, the investigation papers were completed and referred to the deputy public prosecutor's ('DPP') office for further advice and instructions. On the same day, after reviewing the outcome of investigations, evidence provided and recommendations proposed by the Immigration Department of Malaysia, the DPP in considering the said recommendations decided for the applicant to be charged under reg 39(b) of the Regulations. F G

[7] On 4 December 2018, the applicant was brought to the Sepang Sessions Court and pleaded not guilty to the said charge under reg 39(b) of the Regulations.

[8] On 1 July 2019, the applicant was brought to the Sepang Sessions Court and pleaded guilty to committing the offence under reg 39(b) of the Regulations where the court then imposed a fine of RM500 to be paid by the applicant. H

[9] Subsequently, upon payment of the said fine the applicant was arrested under s 35 of the Act and further detained at the Kuala Lumpur International Airport (KLIA) Immigration Detention Centre pending the necessary arrangements to be made for the issuance of the applicant's detention order and removal from Malaysia back to his country of origin. I

[10] On 12 July 2019, by virtue of reg 19 of the Regulations, the applicant's temporary employment visit pass was cancelled and he was issued with a notice of cancellation of such pass under the same regulation.

[11] On 15 July 2019, an order of detention under s 34 of the Act and an order of removal under s 56(2) of the Act was issued to the applicant in order to effect his removal from the country.

[12] The applicant was then detained at the KLIA Immigration Detention Centre pending the process of arrangements made for his removal from Malaysia, leading to the filing of the instant application.

PARTIES SUBMISSIONS

[13] The respective submissions of parties, in essence, is as follows.

The applicant

[14] It was submitted by learned counsel for the applicant that s 32(1) of the Act was plain and unambiguous in that only a person who is convicted under four types and category of offences in particular, ss 5(2), 6(3), 8(5) or 9(5) of the Act shall be liable to be removed from Malaysia as an 'illegal immigrant' as per the title of the provision in the said s 32(1).

[15] Any person therefore who is convicted of any offence under the Act besides the said four categorised offences shall not be liable to be removed under s 32(1) of the said Act.

[16] It was submitted that it was undisputed that the applicant had pleaded guilty for an offence under reg 39(b) of the Regulations for contravening and failing to comply with the condition imposed in respect of the applicant's temporary work and visit permit ('PLKS') which is valid till 28 November 2019.

[17] The applicant however, had not contravened and/or was found guilty of any offence under ss 5, 6, 8 and 9 of the Act.

[18] Because the offence under reg 39(b) of the Regulations did not fall within the ambit of the said s 32(1) of the Act there was no basis for the respondents to issue the order of removal and order of detention both dated 15 July 2019 against the applicant.

[19] It was accordingly submitted that the said order of removal and order of detention had been issued mala fide, was irregular in nature and defective on grounds of material non-compliance with the procedural requirements stipulated in ss 32(1) and 34(1) of the Act.

[20] It was further submitted that there was a condition precedent pursuant to reg 19(1A) of the Immigration Regulations 1963 wherein the controller ie the Immigration Officer must be satisfied that the holder of the said pass ie the applicant, is a prohibited immigrant before the Immigration Officer can cancel such pass.

[21] It was submitted that the imposition of a fine on the applicant does not in any way categorise him as a member of a prohibited class of immigrants and a scrutiny of the order of removal dated 15 July 2019 shows that the respondents had neither mentioned which offence under ss 5, 6, 8 and 9 of the said act the applicant had contravened nor how he was declared as a prohibited immigrant.

[22] The applicant also submitted that the respondents had failed and omitted to comply with reg 26(1) of the Regulations which statutorily provides for an avenue and right of appeal against the refusal, cancellation, declaration or order made as the case may be.

[23] It was submitted that before the applicant had fully exhausted his right to appeal, the respondents instead summarily and arbitrarily issued the order of removal dated 15 July 2019 on the following day.

[24] The applicant next took up the point that the respondent failed to comply with the procedure on cancellation of pass/permit under s 9(3), 9(7) and 9(8) of the Act.

[25] This was because, it was submitted, that a plain reading of s 9(3) of the Act establishes that any notice of cancellation must be sent to the holder of pass to his last known address and if such address could not be ascertained, to cause the notice to be published in the *gazette*. This, it was submitted, was the registered address of the applicants work place.

The respondents

[26] The respondents submitted as their starting point, the fact that pursuant to sub-ss 3(2) and 3(3) of the Act, the Director General of Immigration ('DG') shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.

[27] They also cited the case of *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2017] MLJU 902 in support of the proposition.

[28] The learned deputy public prosecutor submitted that the applicant had contravened reg 39(b) of the Regulations as he was caught working at Matshu Seiki (M) Sdn Bhd without a valid pass or rather was in possession of a pass to work at another company instead ie Sykt Lestary Golden Sdn Bhd, thus failing to comply with the conditions issued in the temporary working visit pass with the rightful registered employer.

[29] On 1 July 2019, after pleading guilty and making payment of the RM500 fine ordered, the applicant was duly arrested under s 35 of the Act and detained at the KLIA Immigration Detention Centre for a period of 30 days pending the necessary arrangements to be made for his removal from the country.

[30] It was then submitted that the officer in charge had accordingly proceeded to make the necessary arrangements to effect the removal of the applicant by firstly cancelling the temporary working visit pass on 12 July 2019 as prescribed under reg 19 of the Regulations.

[31] Following this, an order of detention and removal under ss 34 and 56(2) of the Act was issued to the applicant on 15 July 2019.

[32] The respondent thus submitted that the procedures adopted were in line with the law and urged this court to dismiss the application.

ANALYSIS AND FINDINGS

[33] At the outset, it is apposite to state the position that it is only a non-compliance with the procedural requirements of the Act that will operate to render any act done subject to judicial review.

[34] This is made quite plain by s 59A(1) and (2) of the Act as follows:

> 59A Exclusion of judicial review
>
> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> (a) ...;

(b) ...;

(c) any writ of habeas corpus; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

[35] See also *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor*.

[36] The position taken by the applicant, simply put, is that only a person convicted under the four types and categories of offences stipulated in ss 5, 6, 8 or 9 of the Act and of no other offences can be lawfully removed from Malaysia under the provisions of s 32(1) of the Act by the DG of Immigration.

[37] These four types of offences are reflected in the following sections in so far as they are relevant to the discussion at hand:

Section 5(2)

5 Entry into or departure from Malaysia

(1) The Minister may, by notification in the Gazette, prescribe approved routes and declare such immigration control posts, landing places, airports or points of entry, as he may consider to be necessary for the purposes of this Act, to be immigration control posts, authorized landing places, authorized airports or authorized points of entry, as the case may be, and no person shall, unless compelled by accident or other reasonable cause, enter or leave Malaysia except at an authorized landing place, airport or point of entry.

(2) Any person who contravenes subsection (1) shall be guilty of an offence against this Act.

Section 6(3)

6 Control of entry into Malaysia

(1) No person other than a citizen shall enter Malaysia unless —

(a) he is in possession of a valid Entry Permit lawfully issued to him under section 10;

(b) his name is endorsed upon a valid Entry Permit in accordance with section 12, and he is in the company of the holder of the Permit;

(c) he is in possession of a valid Pass lawfully issued to him to enter Malaysia; or

(d) he is exempted from this section by an order made under section 55.

(2) (Deleted by Act 27 of 1963).

(3) Any person who contravenes subsection (1) shall be guilty of an offence and

shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes.

Section 8(5)

[...] 8(3) The following persons are members of the prohibited classes:

(a) any person who is unable to show that he has the means of supporting himself and his dependants (if any) or that he has definite employment awaiting him, or who is likely to become a pauper or a charge on the public;

(b) any person suffering from mental disorder or being a mental defective, or suffering from a contagious or infectious disease which makes his presence in Malaysia dangerous to the community;

(c) any person who refuses to submit to a medical examination after being required to do so under subsection 39A(1);

(d) any person who —

(i) has been convicted in any country or state of any offence and sentenced to imprisonment for any term, and has not received a free pardon; and

(ii) by reason of the circumstances connected with the conviction is deemed by the Director General to be an undesirable immigrant;

(e) any prostitute, or any person, who is living on or receiving, or who, prior to entering Malaysia, lived on or received, the proceeds of prostitution;

(f) any person who procures or attempts to bring into Malaysia prostitutes or women or girls for the purpose of prostitution or other immoral purpose;

(g) vagrants and habitual beggars;

(h) any person whose entry into Malaysia is, or at the time of his entry was, unlawful under this or any other written law for the time being in force;

(i) any person who believes in or advocates the overthrow by force or violence of any Government in Malaysia or of any established government or of constituted law or authority or who disbelieves in or is opposed to established government, or who advocates the assassination of public officials, or who advocates or teaches the unlawful destruction of property;

(j) any person who is a member of or affiliated with any organisation entertaining or teaching disbelief in or opposition to established government or advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of any officer, either of specific individuals or officers generally, of any Government in Malaysia or of any established government, because of his or their official character, or advocating or teaching the unlawful destruction of property;

(4) The burden of proof that any person seeking to enter Malaysia is not a prohibited immigrant shall lie upon that person.

(5) Subject to any exemption granted under section 55, if any prohibited immigrant enters Malaysia otherwise than in accordance with a valid Pass lawfully issued to him he shall be guilty of an offence against this Act.

Section 9(4)

9(4) Where a Pass is cancelled under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c) —

(a) if its holder is present in Malaysia, he shall not remain in Malaysia after such cancellation and shall be removed from Malaysia in accordance with the provisions of this Act, and he shall, thereafter, be prohibited from entering Malaysia; and

(b) if its holder is outside Malaysia, he shall be prohibited from entering or re-entering Malaysia.

9(5) Any person who enters or re-enters or remains in Malaysia in contravention of any order made under paragraph (1)(a), or in contravention of subsection (4), shall be guilty of an offence against this Act and shall be removed or again removed, as the case may be, from Malaysia.

[38] Section 32(1) states:

32 Removal of illegal immigrants

(1) Any person who is convicted of an offence under section 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director General:

Provided that no citizen convicted of an offence under section 5 shall be ordered to be removed from Malaysia under this subsection.

[39] It is the stand taken by the applicant that s 32(1) of the Act only applies to those whose entry into Malaysia was unlawful. It was argued that as the applicants entry into Malaysia was lawful in the first place as he was in possession of a valid pass to remain and work in Malaysia until 28 November 2019, there constituted no basis for the respondents to issue the notice of removal.

[40] It was argued that a person in the position of the applicant who was convicted under reg 39(b) of the Regulations cannot be subject to an order of removal because it does not fall under s 32(1) of the Act.

[41] Therefore, the order of removal issued under s 32(1) of the Act was defective and a nullity.

[42] With the greatest of respect to learned counsel, s 32(1) of the Act does in no way represent or state that it is only persons convicted of offences under ss 5, 6, 8 or 9 that shall be liable to be removed from Malaysia.

[43] The respondents relied upon the provisions of s 56(2) of the Act which reads as follows:

> 56 Offences
>
> (2) Any person who is not a citizen unlawfully entering or re- entering or attempting unlawfully to enter or re-enter Malaysia or unlawfully remaining in Malaysia shall whether or not any proceedings are taken against him in respect of the offence be liable to be removed from Malaysia by order of the Director General.

[44] It is thus patently obvious that any person belonging to the categories of persons in s 52(2) are also liable to be removed from Malaysia.

[45] The applicant was found during the raid by enforcement officers to be working at a company different from the designated company he was supposed to be working at as endorsed on his employment visit pass. The applicant had thus failed to comply with the conditions issued in his temporary working visit pass with the rightful registered employer.

[46] By doing so, he had contravened reg 39(b) of the Regulations which provide:

> 39 Penalties
>
> Any person who without reasonable cause:
>
> (a) ...
>
> (b) contravenes or fails to comply with any condition imposed in respect of, or instruction endorsed on, any Pass, Permit or Boundary Pass,
>
> *shall be guilty of an offence against these Regulations and shall be liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine.*

[47] On 1 July 2019, the applicant pleaded guilty and paid the fine of RM500 imposed on him. The applicant was then arrested under s 35 of the Act and detained at the KLIA Immigration Detention Centre for a period of 30 days pending the necessary arrangements to be made for his removal from the country.

[48] The applicants pass was also cancelled pursuant to reg 19 of the Regulations which provides as follows:

> 19 Cancellation of Pass and forfeiture of security
>
> (1) Without prejudice to any other specific power to cancel a Pass conferred by or under these Regulations, if the Controller is satisfied that the holder of any Pass issued under these Regulations has contravened or failed to comply with any provision of the Ordinance or of any of these Regulations, or with any condition

imposed in respect of or instruction on such Pass he may —

(a) forthwith cancel such Pass; ...

[49] Once the applicants pass was cancelled, it followed, as night the day, that he was unlawfully remaining in Malaysia. He was therefore, liable to be removed from Malaysia by order of the Director General pursuant to the clear wording of s 56(2) of the Act.

[50] The argument by learned counsel for the applicant that the fine of RM500 imposed upon the applicant was not equivalent to a term of imprisonment and therefore the applicant could not be categorised as a prohibited class of immigrants is untenable in light of the clear provisions of reg 39(b) of the Regulations read together with s 56(2) of the Act.

[51] Moreover, there is no cogent reason in principle to distinguish between the imposition of a fine and imprisonment for the purposes of categorising who or who was not a prohibited class of immigrants.

[52] The powers of arrest and detention of the applicant under the provisions of ss 34–35 respectively of the Act once the applicant was liable to be removed pursuant to s 56(2) of the Act was also lawful.

[53] These sections read as follows:

34 Detention of persons ordered to be removed —

(1) Where any person is ordered to be removed from Malaysia under this Act, such person may be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

Provided that any person detained under this subsection who appeals under subsection 33(2) against the order of removal may, in the discretion of the Director General, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Director General may deem fit.

34(2) ...

34(3) Any person who is detained in custody in pursuance of an order made by the Director General under subsection (1) may be so detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Director General.

35 Power to arrest person liable to removal

Any person reasonably believed to be a person liable to removal from Malaysia under this Act may be arrested without warrant by any immigration officer generally or specially authorized by the Director General in that behalf or by a senior police officer, and may be detained in any prison, police station or immigration

depot for a period not exceeding thirty days pending a decision as to whether an order for his removal should be made.

[54] Learned counsel for the applicant argued that the applicant was denied his right of appeal under reg 26 of the Regulations against the notice of cancellation of his pass because the respondents issued the order of removal before the determination of the appeal and expiration of the seven days appeal period.

[55] The applicant had pleaded guilty to contravention of reg 39(b) of the Regulations. As the applicant was thus found guilty and convicted for contravening or failing to comply with a condition imposed in respect of his pass, this led to the act of cancelling the applicant's employment pass under reg 19 of the Regulations.

[56] A perusal of reg 19 will indicate that it does not provide the holder of the pass the right to appeal.

[57] On the other hand, reg 26 of the Regulations provides a right to appeal but only in respect of the specific offences listed under limb (a) sub-s 8(6) of the Act (if a holder of a permit is refused permission to enter the Federation), limb (b) sub-s 14(5) of the Act (upon the cancellation of the permit or certificate or the making of a declaration) and limb (c) sub-s 33(2) of the Act (against an order of removal made under sub-s 33(1) by the controller).

[58] It follows that the applicant had no avenue of appeal more so when he pleaded guilty to the offence.

[59] Learned counsel for the applicant also submitted that the respondents had no right and lawful authority to first detain the applicant prior to any order of deportation being issued to the applicant.

[60] Since the applicant is an employee under a registered employer company, the respondent should have first delivered and sent the notice of cancellation of pass to the registered address of the employee's work place under the company. Moreover, there is nothing to indicate that the applicants had suffered any prejudice as a result.

[61] There is, however, evidence to show that the applicant was indeed served with the said notice of cancellation of pass on 14 July 2019 see 'MSAL3'. There was therefore also no merit to the applicants contention in this respect.

[62] Upon a consideration of all the circumstances of the case, there was no

procedural non-compliance with the Act or the Regulations nor was the order of detention and the order of removal issued mala fide or irregularly. in the premises, the applicants application for a writ of habeas corpus is dismissed.

Application dismissed.

Reported by Ahmad Ismail Illman Mohd Razali